INDEX

CITATIONS

745018—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1367

BERT CHARLES BOWKER, PETITIONER

v.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 51–53) is reported at 158 F. 2d 854. The opinion of the district court (R. 43–48) is not reported.

JURISDICTION

The judgment of the circuit court was entered January 15, 1947 (R. 53–54). On April 14, 1947, by order of Mr. Justice Rutledge, petitioner's time to file a petition for a writ of certiorari was extended to May 16, 1947. The petition was filed on

May 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether separate offenses were charged in two counts of an indictment for violations of the Mann Act, one alleging transportation of a woman in interstate commerce for the purpose of prostitution, and the other alleging the procuring of a vehicle by which the woman was transported in interstate commerce for purposes of prostitution.

STATUTE INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), commonly known at the Mann Act, provides:

> Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist

in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

STATEMENT

In March 1940, an indictment in five counts was returned against petitioner in the United States District Court for the Western District of Louisiana, charging violations of Section 2 of the Mann Act (R. 14–18). The first count charged that on or about February 9, 1940, petitioner transported and caused the transportation of a woman in interstate commerce "via an automobile" for the purpose of prostitution and debauchery (R. 14–15); the second, that on or

about the same date he procured and aided and assisted in procuring a form of transportation in interstate commerce, i. e., an automobile, to be used by the same woman in going in interstate commerce for the purpose of prostitution and debauchery, and whereby the woman was so transported for such purposes (R. 15–16); the third, fourth, and fifth, that he transported and aided and assisted in transporting the woman in interstate commerce for different immoral purposes (R. 16–18). Petitioner was convicted and on June 21, 1940, he was sentenced to imprisonment for 18 months on the first count, but imposition of sentence on the other counts was suspended and he was placed on probation as of the date of the judgment, with the further provision that supervision begin at the expiration of his sentence (R. 18–19). Petitioner served the 18 months' sentence on the first count (R. 22, 44). On December 6, 1944, his probation was revoked, and he was sentenced to imprisonment for three years on the remaining counts (R. 28–29, 36). On the day that this sentence was imposed, he escaped from custody (R. 31), and he was subsequently sentenced for that offense to imprisonment for one year and one day, to run consecutively to the three-year sentence imposed on December 6, 1944 (R. 39–40).

In November 1945, petitioner filed a petition for a writ of habeas corpus in the United States

District Court for the District of Kansas, in which he alleged that all five counts of the Mann Act indictment charged but one offense; that service of the eighteen months' sentence imposed on the first count constituted full service of the sentence for that offense; and hence that the court had no power to impose the three-year sentence on the remaining counts of the indictment. He further alleged that he had been incarcerated long enough to have served the one-year sentence imposed for escape, and that he was therefore entitled to be discharged from custody. (R. 5–8.) After a hearing, the district court discharged the writ theretofore issued and dismissed the petition, holding that petitioner could not, on habeas corpus, challenge the right of the sentencing courts to impose separate sentences on the various counts of the Mann Act indictment (R. 43–48). On appeal, the judgment of the district court was affirmed (R. 53), the circuit court of appeals holding that since the first and second counts of the indictment charged separate offenses, the additional, single sentence imposed on counts 2, 3, 4, and 5 was proper (R. 51–53).

ARGUMENT

Petitioner renews here the contention urged before both courts below that all five counts of the Mann Act indictment charged but one offense (Pet. 7–10), and he argues from that premise that the sentencing court was without power to impose

both a prison sentence and probation for that one offense (Pet. 10–11). His contention necessarily fails if more than one offense was alleged by the separate counts of the indictment.

Section 2 of the Mann Act provides in separate clauses for the punishment of one who transports a woman in interstate commerce for the purpose of prostitution or debauchery, and of one who procures "any ticket or tickets, or any form of transportation * * * to be used by any woman or girl in interstate or foreign commerce, * * * in going to any place for the purpose of prostitution or debauchery, * * * whereby any such woman or girl shall be transported in interstate or foreign commerce." The indictment charged in the first count that petitioner transported a woman in interstate commerce for the purpose of prostitution and debauchery, and in the second count that he procured an automobile to be used by the woman in going in interstate commerce for the purpose of prostitution and debauchery. A person can procure transportation for a woman and not transport her himself, and, conversely, he may transport her without having procured the means of transportation. Hence, whether the separability of the offenses be judged by the principle that Congress may punish each step in a transaction (*Albrecht* v. *United States,* 273 U. S. 1), or by the test that each offense must contain an element which is not present in the other

(*Blockburger* v. *United States,* 284 U. S. 299), the first and second counts of the indictment charged separate offenses.

None of the cases relied upon by the petitioner (Pet. 8–10) deal with the precise problem here involved. It has been held that the allegation of different purposes for the transportation of the woman does not serve to divide the one transportation into several offenses. *Malaga* v. *United States,* 57 F. 2d 822 (C. C. A. 1). On this basis, the last three counts do not charge separate offenses. But, since the single three-year sentence imposed on counts two to five is less than the five-year maximum, which could have been imposed on the second count alone, the failure of the last three counts to charge separate offenses is immaterial.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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